to be contrary to its decision in the *Chahal* case and gives rise to concern. If the Court should maintain that high threshold, the burden of persuasion on applicants may become even more important on November 1, 1998. On this date, a new permanent European Court of Human Rights will replace the present European Commission of Human Rights as the single controlling body,[15] abolishing the Commission's supervisory role in the first instance.

JULIANE KOKOTT AND HEIKE BERGER-KERKHOFF
University of Düsseldorf

War crimes—applicability of Geneva Conventions and Protocol I—international character of the armed conflict in Bosnia—jurisdiction of German courts to prosecute foreigners for war crimes committed outside Germany—intent requirement for genocide

PUBLIC PROSECUTOR v. DJAJIĆ. No. 20/96, *excerpted in* 1998 Neue Juristische Wochenschrift 392.
Supreme Court of Bavaria, 3d Strafsenat, May 23, 1997.

On May 23, 1997, the Bavarian Supreme Court (Munich) convicted the former Yugoslav national Djajić of abetting murder in fourteen cases and attempted murder in one case. He was sentenced to five years' imprisonment.[1] Djajić is the first person to be convicted by a German court for acts committed during the armed conflict in the former Yugoslavia, although several proceedings in Germany, Austria and Switzerland are under way.[2]

Bavarian authorities have shown a great interest in the arrest and prosecution of war criminals coming from the Balkans. The case of Tadić has received ample attention. He was arrested in Munich and indicted at the Bavarian Supreme Court. Before the main hearing was opened, however, he was transferred to the International Criminal Tribunal for the Former Yugoslavia (ICTY) at the request of the international prosecutor.[3] This transfer was possible only after the German parliament created the needed legal basis for the deferral.[4] In Djajić's case the ICTY prosecutor made no such request, so that the prosecution before the highest court in Bavaria could go forward.

The judgment in the present case was based on the following findings of fact. The alleged event took place on June 22, 1992, near the village of Trnovaca in the Administrative County (Opstina) Foca about eighty kilometers southeast of Sarajevo in Bosnia-Herzegovina. The area was of strategic interest to the Serbs, mainly because it was needed for a Serbian corridor to the Mediterranean Sea. Therefore, as early as January 1992, the Yugoslav People's Army (JNA) endeavored to occupy strategic military positions, and began to harass the Muslim population and drive it out of the region. In April 1992, the Serb population of Trnovaca took up arms, humiliated and tortured their Muslim neighbors, and put them under a strict curfew. During this time Djajić wore the uniform of the local Serb forces and was armed.

In the morning hours of June 22, 1992, a Serbian minibus was destroyed by a mine, killing ten Serb soldiers near Tjentiste. Thereafter, the local military leaders in Trnovaca

[15] The alteration is provided for in Protocol No. 11 to the Convention for the Protection of Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, Eur. TS No. 155, 33 ILM 943 (1994).

[1] This sentence should be compared to the second Sentencing Judgement in Prosecutor v. Erdemović, No. IT-96-22-T (Mar. 5, 1998), who pleaded guilty to murder as a war crime and was sentenced to five years' imprisonment.

[2] A Swiss case, *In re G.*, is summarized in 92 AJIL 78 (1998).

[3] The judgment in the *Tadić* case is summarized in 91 AJIL 718 (1997).

[4] Gesetz über die Zusammenarbeit mit den Internationalen Strafgerichtshof für das ehemalige Jugoslawien (Jugoslawien-Strafgerichtshof-Gesetz) [Law on cooperation with the ICTY (ICTY Act)] v. 10.4.1995 (BGBl. I S.485).

decided, in conjunction with the Serb command in Foca, to kill fifteen Muslim men from the village. In the evening fifteen Muslims were gathered outside their houses. At least fifteen Serb armed soldiers, among them Djajić carrying a semiautomatic rifle, surrounded the group of Muslims and led them to a nearby bridge over the Drina River. There the Muslim men were lined up with their backs to the railing. One of the Serbs opened fire without a word and shot the first Muslim dead. He then encouraged the others to do as he had done. The Muslims were shot and killed. Only one managed to escape by jumping into the water. He appeared at the trial as joint plaintiff and main witness for the prosecution.

It is not certain whether the defendant knew from the beginning about the plan to kill the unarmed Muslims, some of whom he knew. Certainly, when the men were lined up on the bridge, he understood that they were to be shot and that by joining the Serb guards he would help prevent any escape and make the killing possible. Djajić was not directly ordered to shoot and it was never ascertained whether he fired a shot himself. Nevertheless, by his presence on the bridge he wanted to show sympathy for the Serbian cause. He was further aware that none of the men lined up on the bridge could possibly have been responsible for the incident in Tjentiste. Djajić knew that the execution of civilians was an illegal military act, but he thought that the action would stabilize the Serb military occupation of the Foca region. It could not be found, however, that the defendant was generally hostile toward the Muslim ethnic group. On the contrary, he seems to have had close contact with Muslim families, even after the curfew was imposed, and supplied them with food and other goods.

The court found Djajić guilty of fourteen cases of abetting murder and one case of attempted murder.[5] The killing of the fourteen Muslims was planned and intentionally executed. However, the court found that the defendant could not be held responsible for the murder itself. His presence among the Serb guards was nevertheless to be regarded as abetting the murder (*Gehilfe*).[6] In comparison to manslaughter,[7] a murder requires the lowest moral motives (*niedere Beweggründe*). These motives are related to the act, not to the actor. As the defendant knew that the killing was rooted in revenge and in terrorizing the Muslim population, by joining in the execution line he made these motives his own and therefore acted out of the lowest moral motives.

The defendant was found guilty neither of directly committing genocide nor of abetting genocide because he lacked the necessary *mens rea (subjektiver Tatbestand)*. In conformity with the definition of genocide in Article 2 of the Genocide Convention[8] and with the law of the ICTY,[9] German law requires the intent to destroy a national, ethnical, racial or religious group.[10] Because of a lack of proof to the contrary, the court presumed in the accused's favor that he did not see the policy of "ethnic cleansing" as the underlying reason for his action.

Two norms of German law could support the jurisdiction of the German court in this case. One obliges the Federal Republic of Germany to prosecute offenses committed by non-nationals if Germany has an international obligation to do so, even if the crime occurred abroad.[11] This ground for prosecution can be called the principle of universality

[5] Murder is punishable under §211 Strafgesetzbuch [StGB] (German Penal Code).

[6] Punishable according to §27 StGB.

[7] Sec. 212 StGB.

[8] Dec. 9, 1948, 78 UNTS 277.

[9] See, e.g., the passages in Trial Chamber I's Rule 61 decisions in Prosecutor v. Karadzić and Mladić, Nos. IT-95-5-R61 & IT-95-18-R61, paras. 92-95 (July 11, 1996), and Prosecutor v. Nikolić, No. IT-94-2-R61, para. 34 (Oct. 20, 1995), 108 ILR 85, 21, respectively. The chamber speaks of "aggravated intent."

[10] Sec. 220a StGB.

[11] Sec. 6 Nr. 9 StGB.

(*Universalitätsprinzip*).[12] Prosecution can also be based on the principle of vicarious jurisdiction (*stellvertretende Strafrechtspflege*).[13] The court relied on the first.

The international law basis for jurisdiction is found in the Fourth Geneva Convention of August 12, 1949,[14] to which Germany has been party since March 3, 1955, and in the first Protocol Additional of December 12, 1977 (Protocol I),[15] ratified by Germany on February 14, 1991. The court found that Germany's duty to prosecute stems from common Articles 146 and 147 of the Fourth Geneva Convention. The applicability of this "grave breaches" regime, however, depends first on whether the defendant is among the persons bound by the Convention and, second, on whether the victims are persons protected by the Convention.

Yugoslavia ratified the Fourth Geneva Convention on April 21, 1950, and Protocol I on June 11, 1979. The court found that the newly evolving states on the territory of the former Yugoslavia were bound by these treaties automatically upon independence.[16] In so doing, the court relied on the rule embodied in Article 34 of the Vienna Convention on Succession of States of 1978,[17] which it said is accepted as customary law although the convention has not yet entered into force. There was no time gap in which humanitarian law would not have been applicable. As a national of Yugoslavia and then of Bosnia-Herzegovina, Djajić was bound by the humanitarian norms of the Fourth Geneva Convention and Protocol I throughout the conflict.[18]

The question whether the victims were protected persons under Article 4 of the Fourth Geneva Convention is perhaps more difficult to answer. First, the conflict must be an international one at the time of the crime by virtue of Article 2(1) of the Convention. Second, the victims must have been "in the hands of a Party to the conflict or Occupying Power of which they are not nationals." The court found that the conflict in Bosnia-Herzegovina was international in character. Relying on March 6, 1992, as the date of its declaration of independence, the judges found that after this date the armed conflict was not entirely confined to the population of Bosnia.[19] The JNA was preparing for hostilities even before they broke out in April 1992. Under the court's analysis, the fact that the conflict was an international one at this stage seems clear. The crucial date, however, is May 19, 1992, when the JNA officially withdrew its troops from Bosnian territory. The court was convinced that this event modified only the outside perception of the situation. In truth, the Yugoslav intervention continued. A substantial modification did not happen. In this regard, the court considered the overall aim of the armed hostilities. From a Serb point of view, this was the establishment of a "Greater Serbia" and the creation of unimpeded access to the Mediterranean. The troops, weapons and ammunition, even parts of the JNA air force together with the ground staff, were handed

[12] *See* DIETRICH OEHLER, INTERNATIONALES STRAFRECHT 519, Nos. 844–907 (2d ed. 1983).

[13] Sec. 7(2) StGB. *See* OEHLER, *supra* note 12, at 497, Nos. 802–43. As the act was punishable under both Yugoslav and Bosnian law and Bosnia had expressed no interest in extradition, the conditions of this principle were met.

[14] Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287.

[15] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 UNTS 3.

[16] In the case of Bosnia-Herzegovina, this was on March 6, 1992. The newly independent states on the territory of the former Yugoslavia accepted their obligations as regards humanitarian treaty law with alacrity.

[17] Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, UN Doc. A/CONF.80/31, 17 ILM 1488 (1978).

[18] On the ratification list given by the International Committee of the Red Cross (ICRC), Bosnia appears to have succeeded to the Geneva Conventions and Protocol I on December 31, 1992.

[19] That the court emphasized the declaration of independence as the relevant date conflicts with other views. *See, e.g.*, Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AJIL 78, 81 (1994) (listing the relevant factors as recognition by foreign states, the admission of the new states to the United Nations and agreements between these parties and the ICRC).

over by the JNA not to the responsible government, that is, the authorities of Bosnia in Sarajevo, but to the Bosnian Serbs. Furthermore, high-ranking soldiers received their salary directly from Belgrade.

Obviously, the Serb force was party to the conflict in the sense of Article 4(1) of the Fourth Geneva Convention; the court went further and held that it was an "outside" force, making the conflict an international one. The victims were not nationals of this party. Moreover, the evidence before the court suggested that the control of the Serb forces was such that the Muslim population of Foca was "in the hands" of this power (*tatsächlicher Machtbereich*).

It cannot be said that the difficulties posed by these questions have yet been resolved conclusively. Similar settings, it seems, have been dealt with in different ways.[20] The situation here, however, is similar to that in the *Tadić* case. In the judgment concerning jurisdiction, the appeals chamber found that the conflict in the former Yugoslavia could not automatically be seen as international in character.[21] Trial Chamber II, in its judgment of May 7, 1997, held, perhaps surprisingly, but certainly in strict conformity with the appeals chamber's dicta, that the Bosnian Muslims in Opstina Prijedor were not protected persons under the Geneva Conventions. In assessing the same situation as in the instant case, the ICTY came to the conclusion that influence by Belgrade did not amount to internationalization of the conflict.[22] For its part, the Bavarian court referred to the confirmation of the indictment in the *Gagović* case.[23] There the international prosecutor had argued that the situation in the area around Foca was tantamount to an international armed conflict. That the court relied on statements of the prosecutor as authority is surprising. The German legal system does not attribute any judicial authority to the indictment of a prosecutor, whether or not it has been confirmed by a judge.

It might be borne in mind that the appeals chamber in *Tadić* widened the concept of norms applicable to internal armed conflicts,[24] which substantially mitigated the effects of its analysis of the international nature of the conflict. It is doubtful whether a German court could easily apply this alternative approach to jurisdiction under German statutes.

The court treated both the rules set forth in the Geneva Conventions and the principle of noninterference in other states as general principles of international law.[25] It concluded that public international law, far from barring prosecution, corroborated and supported the conclusion that the arguments in favor of prosecuting war criminals in Germany prevail over the limiting principle of noninterference. It considered prosecution as one measure among many others implemented by the international community—be they political, military or humanitarian in nature—aimed at limiting and eventually terminating the policy of expansion and oppression, as well as deportations and other human rights violations, on the territory of the

[20] In particular, the question of internal-international conflict has provoked difficulties. While the Croatian presence in Bosnia was considered tantamount to making the conflict international in character, *see* Prosecutor v. Rajić, No. IT–95–12–R61, Rule 61 Decision, para. 13 (Sept. 13, 1996), 108 ILR 141, the Serb influence was considered as falling short of this threshold, *see* Prosecutor v. Tadić, No. IT–94–1–T, Judgment, paras. 578–608 (May 7, 1997), 112 ILR (forthcoming).

[21] Prosecutor v. Tadić, No. IT–94–1–AR72, Appeal on Jurisdiction, paras. 46–52 (Oct. 2, 1995), 105 ILR 419, 35 ILM 32 (1996).

[22] *Tadić*, No. IT–94–1–T, *supra* note 20, paras. 606–68.

[23] Prosecutor v. Gagović, No. IT–96–23–I, Confirmation of the Indictment, para 4.1 (June 26, 1996).

[24] *See* C. Greenwood, *International Criminal Law and the* Tadić *Case*, 7 EUR. J. INT'L L. 265 (1996).

[25] The judges did so without giving further references. Public international law is not per se applicable in German law. According to Article 25 of the Grundgesetz (Basic Law), public international law prevails over ordinary, that is, nonconstitutional, national law, but only as concerns general principles (*allgemeine Regeln des Völkerrechts*). Treaties, on the other hand, are directly applicable in German law only insofar as they embody commonly accepted international norms, that is, rules that are recognized as binding by a large majority of states, especially those particularly affected.

former Yugoslavia. In view of all these efforts by the international community, national prosecution could not possibly infringe international law. The court concluded that it would be "intolerable" under these circumstances if war criminals could live in liberty in Germany. Moreover, the aim of the prosecution was seen as international in nature. The international community is attempting to deter crimes against civilians during armed conflict.

Lastly, the court considered the particular interests of Germany in this context. Germany must safeguard and foster the trust and reliability of its own citizens in the national and international legal order (*Rechtsbewährungsprinzip*).[26] The basis of this trust would be imperiled among German nationals if prosecutors ignored criminals from the former Yugoslavia. In addition, it is in Germany's legitimate interest not to be seen by the international community as sheltering international criminals. Those who are under suspicion of having committed the most heinous crimes that are rejected by the community of states must not be seen to be living in a haven inside German borders.

* * * *

Djajić certainly was a small fish. That the German authorities nevertheless are serious about the prosecution of minor war criminals must be understood in the context of the huge refugee streams into southern Germany from the areas formerly at war. Although Germany was relatively friendly toward these refugees and opened its borders in an unbureaucratic manner, it also wishes to counter any perception that German territory is a safe haven for criminals, and favors the swift return of the refugees to their homes. These political aims may help explain the vigor and success with which the Bavarian police have pursued foreign war criminals.

The highest judges of Bavaria addressed the problems of international law and its relationship with German domestic law in a convincing manner. Nevertheless, they differ at times with the legal analysis of the ICTY (although arguably not with respect to the result). This divergence seems to be one of the main problems in a two-track system as it is operating in the context of the former Yugoslavia, and as it could be expected to operate under any system in which municipal courts have concurrent jurisdiction. Neither the extent of the need for precise uniformity nor the means for achieving it are clear. The ICTY was not invested with the power of *stare decisis* over municipal courts. One way out of this dilemma is for all courts that deal with international crimes that occurred on the territory of the former Yugoslavia to consider the findings of other courts on similar issues, but even then talismanic deference to the first court to decide an issue obviously cannot be required. The Bavarian court did not necessarily do all it could in this regard. It referred only to the confirmation of an indictment by the ICTY. The *Tadić* case was not cited.

On the other hand, in view of the swift and uncomplicated trial[27] of Djajić by the Bavarian court, the ICTY might regret having asked for Tadić. His trial has caused much judicial trouble. It appears that Tadić himself was only a small fish. Left to the Bavarian courts in Munich, he would most probably already be serving his sentence.

CHRISTOPH J. M. SAFFERLING
Munich

[26] This argument stems from the teaching of the aims and purposes of criminal law. In Germany the arguably prevailing theory of positive general prevention has as one of its main pillars the idea of promoting a sense of reliability in the legal system. *See, e.g.*, GÜNTHER JAKOBS, STRAFRECHT, ALLGEMEINER TEIL, pt. 1, No. 4 (2d ed. 1991); and CLAUS ROXIN, STRAFRECHT, ALLGEMEINER TEIL, pt. 1, §3, No. 27 (3d ed. 1997).

[27] The main hearing started on February 5, 1997, and lasted until May 23, 1997.

International claims—settlement by espousal—takings of property—just compensation

ABRAHIM-YOURI v. UNITED STATES. 139 F.3d 1462.
U.S. Court of Appeals, Fed. Cir., December 4, 1997, *cert. denied sub nom.* Gurney v. United States, June 26, 1998.

On November 4, 1979, a group of militant students seized the United States Embassy in Iran and took forty-nine Americans hostage.[1] The hostages were ultimately released in January 1981, pursuant to the Algiers Accords,[2] which also mandated the return of frozen assets to Iran. The hostage crisis provided the grounds for, literally, thousands of legal actions in the United States. Accordingly, the Algiers Accords provided for the termination of litigation against Iran in U.S. courts and the establishment of the Iran–United States Claims Tribunal (Tribunal) to resolve outstanding claims.[3] The Claims Settlement Declaration provided that claims by U.S. nationals of less than $250,000 ("small claims") would be presented to the Tribunal by the U.S. Government.

Over the next several years, the United States and Iran continued to negotiate the settlement of the small claims. In anticipation of a settlement, Congress passed legislation in 1985 giving the Foreign Claims Settlement Commission (FCSC) standby jurisdiction to resolve claims by U.S. nationals against Iran in the event that a lump sum settlement of all claims was ever concluded between the two countries.[4] As of August 1989, the Tribunal had resolved only 82 small claims, and 2,200 similar claims were still pending.[5]

In May 1990, without the specific consent of the small claimants, the United States negotiated a settlement agreement with Iran for the small claims of U.S. nationals.[6] The agreement provided, in part, that Iran would pay $105 million in exchange for the extinguishment of all outstanding small claims, as well as in settlement of certain claims held by the United States itself in connection with loans made to Iran. The claims of U.S. nationals against Iran would then be referred to the FCSC for adjudication and determination of the final amount.[7] The agreement was finalized on June 22, 1990, and in accordance with its terms the Tribunal awarded $105 million to the United States.

Pursuant to the settlement agreement, the Department of State transferred all of the small claims to the FCSC for a determination of their merits.[8] Of the $105 million paid by Iran, $55 million was taken by the Government itself as satisfaction of its own claim against Iran. The remaining $50 million was allocated for payment of the small claims referred to the FCSC.[9] By 1995, the FCSC concluded its adjudication of the small claims. In total, 1,075 of the claims it had heard were upheld. The FCSC,

[1] *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3, 12 (May 24).

[2] Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 75 AJIL 418 (1981); Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, *id.* at 422 [hereinafter Claims Settlement Declaration].

[3] Claims Settlement Declaration, *supra* note 2. The constitutionality of the Algiers Accords was challenged and upheld in Dames & Moore v. Regan, 435 U.S. 654 (1981), *summarized in* 75 AJIL 954 (1981).

[4] Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, tit. V, 99 Stat. 405, 437 (1985) (50 U.S.C. §1701 note (1994)) [hereinafter Iran Claims Settlement].

[5] *Abrahim-Youri*, 139 F.3d 1462, 1464.

[6] Settlement Agreement in Claims of Less than $250,000, Case No. 86 and Case No. B38, AWD 483, 25 Iran-U.S. Cl. Trib. Rep. 327 (1990 II) [hereinafter Settlement Agreement].

[7] *Abrahim-Youri*, 139 F.3d at 1464. The Settlement Agreement also provided for the "transfer to Iran (by quitclaim) of all property interests underlying the small claims." *Id.*

[8] *See* Richard B. Lillich & David J. Bederman, *Jurisprudence of the Foreign Claims Settlement Commission: Iran Claims*, 91 AJIL 436, 436–38 (1997).

[9] *See Abrahim-Youri*, 139 F.3d at 1464.